SAMBU v. REX.

[App. Crim. Juris. (Brown, J.) December 7, 1946]

Minor Offences Ordinance, Section 34 (1)—Statement to Police Officer by person suspected of offence under Section 34 (1) Minor Offences Ordinance that he had taken goods from a godown—Confession—Whether improper admission of such statement can be cured under Section 448 of the Criminal Procedure Code—Evidence Ordinance Sections 25, 26 and 168.

In this case the accused had been convicted of being in possession of 9½ yards of cloth which was reasonably suspected of being stolen or fraudulently obtained, contrary to Section 34 (1) of the Minor Offences Ordinance. The case for the prosecution was that at 8.50 p.m. on the 28th June 1946 two police officers of the Singapore Harbour Board Police were on patrol near the Harbour Board Traffic Office. They saw a man walking, with something gripped under his armpit, in the direction of Gate 5. They flashed their torches on him, and the man ran about 20 feet towards the fence which borders Keppel Road. When he reached the fence, he threw the bundle over the fence into Keppel Road. As soon as the man started to run the two Policemen gave chase, and while they were giving chase over that distance of 20 feet they kept their torches flashed on to the man all the time. They caught him after he had thrown the bundle over the fence, and the man whom they caught was the accused. One of the police officers recovered the bundle from Keppel Road, and it was found to contain cloth tied in a handkerchief. The accused was asked what he was doing, and he replied that he had taken the cloth from Godown 14. The Police officer who had questioned the accused went to Godown 14, where he found a lot of cloth similar to the cloth contained in the bundle. The accused in his defence denied knowledge of the cloth. He said he was coming out of a lavatory when he heard the noise of someone running and he was arrested. He was convicted and sentenced to 6 weeks' r.i. and he appealed against his conviction and sentence.

Held, (1) that the accused's statement to the police officer that he had taken the cloth from Godown 14 was improperly admitted in evidence, contrary to Section 26 of the Evidence Ordinance, as it was a confession made by him while he was in the custody of a police officer.

(2) that Section 448 (f) of the Criminal Procedure Code and Section 168 of the Evidence Ordinance are applicable to such a case and that the Appellate Court has to consider whether on the facts of the case and assuming that there had been no evidence of the confession the learned Magistrate must inevitably have arrived at the same conclusion as he in fact did;

(3) that, as in this case, it was clear that the learned Magistrate must inevitably have convicted the accused upon the evidence of the Police Officers that they had not lost sight of the accused in their chase of him and without the evidence of the confession, the conviction must be upheld and the appeal be dismissed.

Cases referred to:—

(1) *Tan Hoe Seng v. P. P.* (1936) F.M.S.L.R. 135; 5 M.L.J. 272.

(2) *R. v. Cohen and Bateman* 2 Cr. Ap. Rep. 197.

(3) *R. v. Williams and Woodley* 14 Cr. Ap. Rep. 135.

(4) *R. v. Harold Jones alias George Wright* 16 Cr. Ap. Rep. 124.

MAGISTRATE'S APPEAL.

S. C. Goho for the Appellant.

A. W. Bellamy (D.P.P.) for the Respondent.

The facts and arguments sufficiently appear from the judgment.

Brown, J. :—The Appellant was convicted by the learned Magistrate of being in possession of 9½ yards of cloth valued at $10/- which was reasonably suspected of being stolen or fraudulently obtained, contrary to section 34 (1) of the Minor Offences Ordinance, and was sentenced to 6 weeks' rigorous imprisonment.

The case for the prosecution was that at 8.50 p.m. on the 28th June two police officers of the Singapore Harbour Police were on patrol near the Harbour Board Traffic Office. They saw a man walking, with something gripped under his armpit, in the direction of Gate 5. They flashed their torches on him, and the man ran about 20 feet towards the fence which borders Keppel Road. When he reached the fence he threw the bundle over the fence into Keppel Road. As soon as the man started to run the two policemen gave chase, and while they were giving chase over that distance of 20 feet they kept their torches flashed on to the man all the time. They caught him after he had thrown the bundle over the fence, and the man whom they caught was the accused. One of the police officers recovered the bundle from Keppel Road, and it was found to contain cloth (Ex. B) tied in a handkerchief (Ex. C). The accused was asked what he was doing, and he replied that he had taken the cloth from Godown 14. The police officer who had questioned the accused went to godown 14, where he found a lot of cloth similar to the cloth contained in the bundle.

By the section under which the accused was charged it is an offence to be in possession of anything which may reasonably be suspected of being stolen or fraudulently obtained, if the accused fails to account satisfactorily how he came by the same. The accused's story was that he was employed as a clerk by the Harbour Board, by whom he had been employed for 20 years. On the night in question he had been

working on a ship at berth 13, from which damaged cargo was being taken to godowns 15 and 16. Having finished work he went to the lavatory near the Traffic Office, which he says is the only lavatory used during the night and is open to the staff both day and night. Coming out of the lavatory he heard footsteps of someone running, and he was arrested. He says that this lavatory, near to the place where he was arrested, is the only lavatory which is open at night. This point has been put to the first police officer in cross-examination and this is what he said :—

> There is a lavatory near where the accused was arrested. This lavatory is locked after 5 p.m. I say that this lavatory cannot be used after 5 p.m.

The accused denied that he had ever made the statement to the police officer which he was alleged to have made—that he had got the cloth from godown 14. The accused called one witness, who was also a clerk employed by Harbour Board and works with the accused. He said that at 8.30 p.m. the accused told him that he was going to the lavatory, and when he left to go to the lavatory he was not carrying the cloth (Exhibt B). He also said that he had never seen the accused use the handkerchief (Ex. C).

It is stated in ground (c) of the Petition that "the learned Magistrate having accepted that the prosecution had established a prima facie case from the circumstances thought the onus was on the accused to establish his innocence", and that he was wrong in law in coming to such a conclusion. But under the section, as soon as the prosecution have established a reasonable suspicion that the article of which the accused is in possession has been stolen, it is then upon the accused to give a satisfactory account of how he came by it. But there is no question of the accused giving a satisfactory account of how he came by it in this case, because the accused says that he never did come by it. According to him, he never had the bundle, he was not the man who threw the bundle over the fence, and the police officer arrested him in mistake for the man whom they spotted by the light of their torches as having the bundle. Therefore, upon the facts, the only question is whether the accused is the man whom the police saw with the bundle before he threw it over the fence.

Mr. Goho has referred me to no less than eight authorities to remind me of the unquestionable proposition that when the appellate court is convinced that the court below has formed a wrong opinion of, or has drawn wrong inferences from, the facts, the appellate court is entitled, and indeed bound, to give effect to its own conviction of what are the true facts; and that where the court below has made no comment on the demeanour of the witnesses the appellate court is in just as good a position as the trial court to judge the facts. He concluded his examination of these eight authorities by observing that in every such case, whether the appellate court has upheld or rejected the lower court's finding of fact, it has scrupulously gone into all the evidence itself. I should have been surprised if it had been otherwise. I can only say that having carefully gone into all the evidence, I think that the question of fact in this appeal resolves itself into a very small compass. It is whether the evidence that the police officers kept the accused in the light of their torches from the time when they first saw him with the bundle under his arm to the time when they arrested him, during which time they were chasing him and (by the light of their torches) saw him throw the bundle over the fence, is to be believed. I can see nothing on the record to suggest that the police officers were lying or that this is a trumped-up charge. As to whether there is any possibility of the two police officers being genuinely mistaken, that is a question which I shall examine later in this judgment in connexion with another ground of appeal. I will say at once that if the question of fact were the only ground of appeal, there is nothing which could cause me to interfere with the Magistrate's finding.

A more serious question in this appeal, as it seems to me, is the question whether the accused's statement to the police officer that he had taken the cloth from godown 14 was properly admitted in evidence. And a more serious question even than that is: assuming it was improperly admitted what effect must that impropriety have on this conviction.

Although the appellant was represented before the Magistrate no objection appears from the record to have been taken to the admission of this evidence at the time. And although the learned Magistrate dealt with this very important matter in his judgment he seems to have regarded section 25 of the Evidence Ordinance as the relevant section and not (as I think) section 26. He gives three reasons for admitting it :—

(1) That this explanation, though amounting to a confession, was not contrary to section 25 of Cap. 13, because the accused was not at that time a person "accused" of any offence;

(2) That the evidence was properly tendered in support of the charge under section 34 (1) of Cap. 24 (which requires the accused to give a satisfactory account of how he came by the property which is reasonably suspected of being stolen);

(3) That the police officer to whom the statement was made was not a police officer who could commence an investigation and this evidence was therefore not contrary to section 124 (1) of the Criminal Procedure Code.

Section 25 of the Evidence Ordinance says that "no confession made to a police officer below the rank of Inspector by a person *accused* of any offence shall be proved as against such person." But section 26 says that "no confession made by any person while he is in the custody of a police officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person." There is nothing technical about being in custody. A person is in custody when he is in a state of being guarded and watched to prevent his escape. In order to answer the question of whether the appellant was in custody at the time when he is alleged to have made the statement it is only necessary to consider what would have happened if, at that time, he had tried to run away.

As to the statement being properly admitted in evidence by reason of the fact that the section makes it incumbent on the accused to give a satisfactory explanation of how he came by the property this means that he must give a satisfactory explanation at the trial. It does not mean that an explanation given to a police officer, which amounts to a confession, may be given in evidence contrary to section 26 of the Evidence Ordinance. That the statement, if it did not amount to a confession, was not rendered inadmissible by section 124 (1) of the Criminal Procedure Code is correct. The point is: was it a confession? If so, it was in my opinion clearly inadmissible under section 26 of the Evidence Ordinance. Mr. Bellamy has referred me to the case of *Tan Hoe Seng v. P. P.*[1], the head-note of which reads:—

> Any explanation given by the accused to the police can be used in evidence against him, because the provisions of section 113 of the Criminal Procedure Code (which is the same as our section 124) have no application to a prosecution under section 35 of the Minor Offences Enactment (which is the same as our section 34).

The facts in that case were that the appellant was acting as the master of a motor launch. The police, acting on information received, found 18½ bags of rubber on board. Asked where he got the rubber, he gave the names of eight Malays living in or near Bota, whom he pointed out to the police. They all denied any ownership or other interest in the rubber. Two days later the accused handed to the police chits purporting to have been given to him by three licensed rubber dealers. They too denied all knowledge of these chits which they said were forgeries.

But the clear distinction between that case and the present is that the statements which the accused made in that case were not confessions. They were statements which, if they were true, were exculpatory. And as there was no question of them having been made in the course of a police investigation they were clearly admissible. Sections 25 or 26 of the Evidence Ordinance were never mentioned in that case, for the reason that it was never suggested that the statements were confessions.

Now a confession is an admission which states, or which suggests the inference, that the person making it committed the crime. The statement here was: "I took the cloth from inside godown 14 Singapore Harbour Board." Was that an "explanation", which was subsequently discovered to be untrue, as in the *Tan Hoe Seng* case? Or was it an admission which suggested the inference that the accused had stolen the cloth from godown 14? It was certainly not proved subsequently to be untrue, because when the police officer went to the godown he found cloth similar to Ex. B. And although there is no evidence in this case to prove that any cloth was missing from the godown (and if there had been, as Mr. Bellamy points out, the charge would have been under a section in the Penal Code) the fact that there was cloth in the godown which was similar to the cloth found in the bundle was a fact which raised a suspicion that the cloth in the bundle came from the godown: and the accused's statement fixed that suspicion on the accused. I cannot see what other inference can be drawn from the words "I took the cloth from inside godown 14" than an inference of guilt. The learned Magistrate clearly accepted this statement as a confession; and I hold that it was a confession and improperly admitted.

The final question is perhaps the most serious of all, and is certainly the question which has given me the most difficulty. What effect ought the improper admission of this confession to have on the conviction?

I have been asked to cure the irregularity under section 448 of the Criminal Procedure Code which says :—

> Subject to the provisions hereinbefore contained no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —
>
> (e) the improper admission....of any evidence; ....unless such....improper admission.... of evidence has occasioned a failure of justice.

The other relevant provision is section 168 of the Evidence Ordinance which says :—

> The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

Section 168 of our Evidence Ordinance corresponds, word for word, with section 167 of the Indian Evidence Act. But section 448 of our Criminal Procedure Code which is taken from section 537 of the Indian Code of Criminal Procedure differs in that in the Indian section the item relating to the improper admission or rejection of evidence does not appear. For some reason therefore the Legislature of this Colony has thought it necessary to insert this item which does not appear in the Indian section, and to provide specifically that a finding shall not be reversed on account of the improper admission or rejection of evidence, unless such improper admission has occasioned a failure of justice.

The English section is section 4 (1) of the Criminal Appeal Act, 1907. It sets out no specific items but states that the Court of Criminal Appeal "shall allow the appeal if they think that the . . . judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal :—

> Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

The only point I am making here is that the Legislature of this Colony has thought it necessary to provide specifically for the case of wrongful admission of evidence in section 448 of the Criminal Procedure Code and has not left it to be dealt with as an "irregularity", as in the Indian section, or as "a wrong decision of any question of law" or "any ground of a miscarriage of justice", as in the English section.

Now the wrongful admission of evidence in this case was in breach of a cardinal rule of our law of evidence and of a safeguard which the Legislature has provided. Is that any reason for making the wrongful admission of a confession to a police officer an exception to paragraph (e) of section 448 of the Criminal Procedure Code and for importing into that paragraph words which do not exist? In England this confession, made in these circumstances, would have been admissible, so that no case under English law can be on all fours with the present case. But in England cases of irregularity no less serious have occurred, such as allowing the jury to be made aware of the accused's previous convictions. And I think I must be guided by such cases as *Cohen and Bateman*[2], *Williams and Woodley*[3] and *Harold Jones alias George Wright*[4] and consider whether on the facts of this case, and having regard to the evidence given at the trial, that without this irregularity, and assuming that there had been no evidence of this confession, the learned Magistrate must inevitably have arrived at the same conclusion.

I have already said that there is nothing upon the record to suggest that this was a trumped-up charge. But was there any possibility of the police officers being mistaken? And if there was any such possibility, however slight, might that possibility have been removed from the mind of the Magistrate by the evidence of the confession?

If the two police officers, as a fact, kept the accused in view by the light of their torches from the time when they first saw him to the time when they arrested him, I can see no faintest possibility of any mistake. But the evidence of Farman Shah is: "I saw accused walking. He had something wrapped under his left armpit. Accused appeared to be walking towards gate 5. When he was near gate 5 he turned towards a spot near the fence. I flashed my torch on Accused. I went up to Accused and arrested him." If Farman Shah's evidence had been left at that, there was nothing to indicate (so far as Farman Shah's evidence was concerned) that he flashed his torch on the accused before he threw the bundle over the fence; still less that he chased him in the light of the torch. But the following evidence was elicited from Farman Shah in cross-examination :—

> When I first saw Accused, Accused was walking. When I flashed my torch on Accused, Accused ran.

Accused ran 20 feet. Then he threw something over the fence. Accused ran from the spot where I first saw him to the fence where he threw something over. The distance was about 20 feet. P.C. 82 was at my side at the time. P.C. 82 also ran after accused. All the time we kept our torches flashed on Accused. Without the help of my torch I would not have seen anything.

That was the evidence of Farman Shah, elicited, as I say, in cross-examination.

P. C. 82, Abdul bin Mohamed Aziz, said:—

I saw a man walking. He had something gripped under his left armpit. I flashed my torch on him, and so did 1st witness. This man ran to a spot near the fence.

And in Cross-examination:—

I was 20 feet from Accused when I first set eyes on Accused. I flashed my torch on Accused. Accused then ran towards the fence. I saw Accused walk. I flashed my torch on him. Then I saw Accused run towards the fence. When I flashed my torch I saw Accused grip something under his left armpit.

So there we have it quite clearly stated by these two witnesses that when they first flashed their torches the accused was walking, with the bundle gripped under his arm; that he then began to run towards the fence; that having run 20 feet he threw the bundle over the fence; and that the torches were flashed on him all the time.

Now let us examine the accused's evidence to see if it raises any possible doubt. He says:—

As I came out of the lavatory I heard the footsteps of someone running. 1st witness came up and arrested me. I have heard the story of 1st witness. I say I did not run.

I can see nothing in the accused's evidence which seems to raise the slightest doubt. All that we have from him is the statement that he heard the footsteps of someone running, and a denial that he himself ran. And the bare statement that the first witness came up and arrested him.

Upon that evidence I can take no other view than that the learned Magistrate, assuming there had been no evidence of the confession, must inevitably have come to the conclusion that the two police officers had the accused in the light of their torches from the moment when they first saw him to the moment when they arrested him, and that during the time they were chasing him, over a distance of 20 feet, they never lost sight of him. Inevitably, upon that evidence alone, and without the evidence of the confession, he must have convicted the appellant. I should be ignoring the provisions of paragraph (e) of section 448 of the Criminal Procedure Code and of section 168 of the Evidence Ordinance, and of the principles upon which appellate courts act under kindred provisions, if I allowed the appeal.

The appeal is dismissed.

Appeal Dismissed.

NETHERLANDS INDIES GOVERNMENT v. ALLIED COMPANY.

[Orig. Civil Jurisdiction (Brown, J.) November 29, 1946]

Rules of the Supreme Court, Order 2 Rule 4, Order 4 Rule 1 and Order 63 Rule 1—Suit in the name of Netherlands Indies Government—Whether monarchical state must sue in name of Monarch—Writ must state where plaintiffs or their duly authorised representative resides—Failure to do so is an irregularity which can be cured by amendment under Order 63, Rule 1 of Rules of Supreme Court.

In this motion the defendant company applied to set aside the Writ on the following grounds:—

(1) The plaintiff "Netherlands Indies Government" does not exist.

(2) If it does exist it is not recognised as such by His Majesty's Government.

(3) The action is not maintainable by the plaintiff as specified in the Writ.

(4) Even if the plaintiff did exist it could not carry on business at the address specified in the Writ, that is No. 37 Robinson Road.

(5) Order 2 Rule 4 has not been complied with.

It was argued firstly that a foreign sovereign or state can only sue by the name by which it has been recognised; and secondly that the Netherlands is a monarchical state and therefore it is the Monarch alone who can sue in the Courts in tort. It was also argued that Order 2 rule 4 of the Rules of the Supreme Court, has not been complied with as the Writ has not specified the "place of abode" of the plaintiff.

Held, (1) that by virtue of the Netherlands Indies Accountability Act, the plaintiff, the Netherlands Indies Government are a legal entity, capable of holding property and therefore capable of bringing actions in respect of such property;

(2) that there is no authority for the proposition that in the case of a Monarchical State a Writ can only issue in the name of the Monarch; and

(3) that the Writ in this case is wrong as it has failed to state where the plaintiff or their duly authorised representative resides, but this irregularity can be cured by amendment under Order 63, Rule 1 of the Rules of the Supreme Court.

Cases referred to:—

(1) *Colombian Government v. Rothchild* 57 E.R. 514.